



No. 523-530

**United States Circuit of the Ninth Circuit**

October Term, 1944

**UNITED STATES OF AMERICA, PETITIONER**

**FRANKSON DISTILLERS, INC.; NATIONAL DISTILLERS  
ASSOCIATION; BROWN FORDMAN  
DISTILLERS CORPORATION; BURMAN WALKER, INC.  
INDUSTRIAL DISTILLERS CORPORATION;  
SHAW-WALKER DISTILLERS CORPORATION; MCKINNON &  
SUNSHINE DISTILLERS, INC.; SHIELD**

**PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH  
CIRCUIT**



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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM-DISTILLERS CORPORATION; MCKESSON & ROBBINS, INCORPORATED; J. E. SPEEGLE

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General prays that a writ of certiorari be issued to review judgments of the Circuit Court of Appeals for the Tenth Circuit which reversed judgments against respondents entered by the District Court for the District of Colorado after respondents had pleaded nolo contendere.

### OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 105) is not yet reported. The opinion of the District Court is reported in 47 F. Supp. 160.

**JURISDICTION**

The judgments of the Circuit Court of Appeals were entered on August 26, 1944 (R. 132-135). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule 11 of the Criminal Appeals Rules.

**QUESTIONS PRESENTED**

1. Whether a conspiracy by retailers within a State not to purchase the product of certain producers engaged in shipping their goods into the State from other States restrains interstate commerce and violates the Sherman Act if the retailers do not purchase directly from the producers but from the producers' vendees.

2. Whether a conspiracy to subject a commodity moving in interstate commerce to agreements to maintain the resale price on intrastate sales of the commodity restrains interstate commerce and violates the Sherman Act.

3. Whether a conspiracy on the part of producers, wholesalers, and retailers to blanket by price-fixing agreements the entire wholesale and retail trade in a commodity within a State restrains the trade of those shipping the commodity into the State from other States and violates the Sherman Act.

**STATUTE INVOLVED**

Section 1 of the Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by

the Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. 1, provides in part as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, \* \* \* : *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each

other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, \* \* \*.

#### STATEMENT

An indictment in two counts was returned against respondents and certain other defendants charging them with violating Section 1 of the Sherman Act. After the district court had overruled demurrers to the indictment and motions to quash, the Government was required to elect between the two counts and elected to stand on the second, and the first count was thereupon quashed (R. 53-54). Respondents pleaded *nolo contendere* to the second count and judgments imposing fines were entered (R. 56-63). On appeal by the respondents,<sup>1</sup> the Circuit Court of Appeals reversed the judgments against them upon the ground that the indictment failed to show that the conspiracy charged in the second count was in restraint of interstate commerce.<sup>2</sup>

<sup>1</sup> Six of the respondents are out-of-state producers (R. 4), one is a wholesaler doing business in Colorado (R. 5), and one is a retailer doing business in Colorado (R. 6, 11).

<sup>2</sup> After the court had filed an opinion on respondents' appeals it set the appeals, together with the appeals in two other cases involving the validity of indictments returned under the Sherman Act (*United States v. Safeway Stores, Inc.*, and *United States v. Kroger Grocery & Baking Co.*), for rehearing before the full bench of the Tenth Circuit (R. 104-105). The opinion on rehearing, which covers all of these appeals, was substituted for the opinions previously announced by the court in these cases (*ibid.*).

The defendants named in the indictment are various producers of alcoholic beverages who ship their product into Colorado from points outside the State, various wholesalers and retailers of such beverages doing business in Colorado, an association of such wholesalers and an association of such retailers, and certain officers or employees of the foregoing defendants (R. 3-13, 19). The indictment alleges that alcoholic beverages are marketed in Colorado by means of a continuous flow of shipments from producers outside the State, through wholesalers and retailers, to consumers in the State (R. 13, 19); that over 98% of the spirituous liquor<sup>3</sup> and over 80% of all wines consumed in Colorado are produced outside the State (R. 14, 19); and that the defendant wholesalers and defendant retailers handle most of the respective wholesale and retail sales of alcoholic beverages in Colorado (R. 14, 19).

The conspiracy charged against the defendants is set forth in paragraphs 30 and 31 of the indictment (R. 19-21). Paragraph 30 makes the general charge that the defendants have been engaged since January 1936 in a conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado from producers located outside the State by raising and fixing retail mark-ups and margins of profit on such beverages and that this conspiracy is in restraint of inter-

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<sup>3</sup> Spirituous liquor is defined to mean any beverage containing 24% or more of alcohol, by volume (R. 2).

state commerce in these beverages. Paragraph 31 alleges that it has been a part of this conspiracy that—

(a) The defendants agree upon and adopt high and noncompetitive retail prices, mark-ups, and margins of profit.

(b) The defendant retailers and wholesalers agree upon a program to induce and compel producers to enter into "fair trade" contracts (affecting every type and brand of alcoholic beverage shipped into Colorado) and to establish in and by these contracts the retail prices, mark-ups, and margins of profit upon which the defendants have agreed.

(c) The defendant retailers prepare and adopt forms of fair trade contracts acceptable to themselves and agree with producers and wholesalers upon the forms of such contracts to be used by the latter.

(d) The defendant retailers circulate among themselves bulletins listing the names of producers and wholesalers who enter into fair trade contracts and the names of those who do not; agree to patronize only those producers and wholesalers who make such contracts and who compel observance of the minimum retail prices established therein; and agree to withhold their patronage from producers and wholesalers who fail or refuse to enter into fair trade contracts embodying the agreed retail prices, mark-ups, and margins of profit.

(e) In connection with revisions in the retail prices established by said fair trade contracts, the defendant retailers agree with defendant wholesalers and producers as to such revisions as will maintain the agreed retail mark-ups and margins of profit.

(f) The defendant retailers boycott wholesalers and producers who supply their products to retailers who do not observe the retail prices, mark-ups and margins of profit established by the fair trade contracts upon which the defendants have agreed.

The indictment alleges that one effect of the conspiracy has been to restrain and suppress interstate commerce in alcoholic beverages not covered by fair trade contracts (R. 23).

The grounds of the holding below that the indictment does not show any restraint of interstate commerce which the Sherman Act prohibits are not entirely clear. The decision appears to rest on two assumptions as to the application of the act. One is that a conspiracy to subject articles moving in interstate commerce to resale price maintenance agreements is not in restraint of interstate commerce if the sales on which prices are thus maintained are intrastate sales.<sup>4</sup> The other is that a conspiracy to boycott a producer, if

<sup>4</sup> The court seemed to think that all allegations of the indictment other than the charge of boycotting were disposed of by the fact that the indictment charged price-fixing only in retail sales and did not charge fixing the prices at which producers sold to wholesalers (R. 117, 118).

carried out by refusing to purchase his goods from his vendees, is not a conspiracy in restraint of the trade between the producer and his vendees.<sup>5</sup>

**SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

(1) In holding count two of the indictment invalid.

(2) In holding that a conspiracy by retailers to boycott producers engaged in shipping their product in interstate commerce is not in restraint of this commerce if the retailers cannot legally purchase directly from the boycotted producers.

(3) In holding that a conspiracy to subject articles moving in interstate commerce to resale price maintenance contracts is not in restraint of interstate commerce if the sales on which prices are thus maintained are intrastate sales.

(4) In failing to hold that the indictment sets forth a conspiracy which, by eliminating price competition among wholesalers and retailers of alcoholic beverages in Colorado, restrains the trade of producers shipping such beverages to Colorado from other States.

(5) In reversing the judgments of the district court and dismissing the indictment as to respondents.

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<sup>5</sup> The court said that since the law of Colorado does not permit retailers in that State to purchase liquor from out-of-State producers (R. 117), the allegations of the indictment that retailers boycotted producers are "ineffective in charging an offense under the Sherman Act" (R. 118).

## REASONS FOR GRANTING THE WRIT

1. The indictment charges the defendant retailers with conspiring to boycott all producers shipping alcoholic beverages into Colorado who fail or refuse to enter into the fair trade contracts demanded by the retailers (R. 21-22). The holding of the court below that, because the retailers do not purchase directly from the producers, this allegation was insufficient to set forth a violation of the Sherman Act is, we submit, in conflict with numerous decisions of this Court.

In *Fashion Originators' Guild, Inc. v. Federal Trade Commission*, 312 U. S. 457, the Guild members, for the purpose of preventing the sale of garments copied from designs which Guild members had originated, agreed not to sell their own goods to retail stores which had purchased garments copied from their designs. This Court held the combination illegal under the Sherman Act although, just as in the present case, there were no direct dealings between the boycotting group and the producers against whom the boycott was directed. Similar agreements not to purchase, or not to work on a manufacturer's product after it is in the hands of his vendees, or not to deal with such vendees, have been held to violate the Sherman Act. *Loewe v. Lawlor*, 208 U. S. 274; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443;

*Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37.<sup>6</sup>

It is immaterial that the indictment in the present case does not allege a purpose to destroy or injure the interstate trade of the boycotted producers. The direct and necessary effect of a boycott by retailers of producers who do not sell under fair trade contracts is to restrain or suppress the interstate trade of these producers since there is no market for their beverages in Colorado if the Colorado retailers refuse to buy them. Where restraint of interstate trade in a commodity is "the necessary and consequences" of the acts charged against the defendants in a Sherman Act indictment, no "allegation of a specific intent to restrain such trade" is necessary. *United States v. Patten*, 226 U. S. 525, 543.

2. The indictment unmistakably alleges a conspiracy to induce and compel the shipment of alcoholic beverages into Colorado under fair trade contracts establishing minimum retail prices, in other words, under resale price maintenance contracts.<sup>7</sup> Since the indictment charges that these

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<sup>6</sup> The fact that the above cases involved restraints by labor groups which today would probably fall within exemptions given by the Clayton Act, does not destroy the authority of the cases as interpretations of the application of the Sherman Act.

<sup>7</sup> Section 1 of the Colorado Fair Trade Act (1937 Session Laws, chap. 146) provides in part:

"No contract relating to the sale or resale of a commodity which bears \* \* \* the trade-mark, brand or name of

contracts were entered into pursuant to agreement among various retailers, as well as pursuant to agreement among various wholesalers, they are not within the exemptions from the Sherman Act given by the Miller-Tydings Act\* and the court below made no reference to that Act. We submit that the holding by the court below that the indictment fails to state an offense under the Sherman Act is in conflict with decisions by this Court, rendered in cases prior to the Miller-Tydings Act or in cases subsequent thereto but where the Act was not applicable, holding that agreements for the sale of goods in interstate commerce under contracts providing for resale price maintenance on subsequent intrastate sale of the goods are illegal under the Sherman Act.

In *United States v. Univis Lens Co.*, 316 U. S. 241, the defendants sold multifocal lenses both to wholesalers and to retailers. The contracts with both classes of distributors provided for resale

the producer \* \* \* shall be deemed in violation of any law of the State of Colorado by reason of the following provisions which may be contained in such contract :

"(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

"(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller."

\* See the second proviso to the first sentence of Section 1 of the Sherman Act, as amended (*supra*, pp. 3-4). The Miller-Tydings Act amended Section 1 by adding the two provisos to the first sentence of that section.

price maintenance. As to retailers at least, the resale on which price was fixed was necessarily intrastate since the retailer was authorized to sell (see pp. 244, 245) only to consumers of the lenses. This Court, in holding that the contracts with retailers, as well as those with wholesalers, violated the Sherman Act, said (pp. 252-253):

Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act \* \* \* and restrictions imposed by the seller upon resale prices of articles moving in interstate commerce were, until the enactment of the Miller-Tydings Act, 50 Stat. 693, consistently held to be violations of the Sherman Act.

*Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, and *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, are similar holdings. In the latter case the defendants' jobber licensing system was held illegal under the Sherman Act because the contracts under which the Ethyl Corporation authorized refiners to use and sell its patented fluid provided for control by Ethyl of the prices and business practices of the jobbers to whom the refiners sold. The facts make it clear that most of the jobbers whose sales prices and practices

were thus controlled sold exclusively in intrastate commerce.<sup>9</sup>

3. The present indictment charges a conspiracy to blanket the wholesale and retail trade in Colorado by price-fixing agreements. Since the necessary effect of this conspiracy is to compel out-of-State producers to sell in a market in which price competition among purchasers is wholly or largely suppressed, the indictment sets forth a restraint which operates directly and substantially upon interstate commerce and violates the Sherman Act.<sup>10</sup> The court below erroneously relied upon cases such as *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, involving a statute confined to acts "in" interstate commerce. Compare *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52.

4. The Government submits that the decision below should be reviewed not only because it is in conflict with applicable decisions of this Court, but also because it presents important questions concerning the application of the Sherman Act to conspiracies to induce or require producers to sell

<sup>9</sup> This is a necessary inference from the fact that there were some 11,000 licensed jobbers, most of whom would supply only retail service stations located in the same State as the supplying jobber.

<sup>10</sup> *Local 167 v. United States*, 291 U. S. 293, 297; *Swift & Co. v. United States*, 196 U. S. 375, 398; *California Retail Grocers & Merchants Assn., Ltd. v. United States*, 139 F. (2d) 978 (C. C. A. 9), certiorari denied April 24, 1944, No. 787, 1943 Term.

under resale price maintenance contracts establishing minimum retail or wholesale prices, in purported compliance with State fair trade laws and the Miller-Tydings Act of August 17, 1937, 50 Stat. 693. There are now three pending proceedings brought under the Sherman Act involving like issues <sup>11</sup> and it is probable that there will be further proceedings of this kind in the future.

#### CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,  
*Solicitor General.*

SEPTEMBER 1944.

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<sup>11</sup> *United States v. Nat'l Assn. of Retail Druggists*, No. 683c (Criminal), D. C. N. J.; *United States v. Nat'l Wholesalers' Druggists' Assn.*, No. 618c (Criminal), D. C. N. J.; *United States v. N. Y. State Pharmaceutical Assn.*, No. C-114-75, S. D. N. Y.

